IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAVID FLOYD,	:	Civil No. 3:13-cv-578
Plaintiff	:	
	:	(Judge Mariani)
v.	:	
	:	
LT. OLSHEFSKI, *et al.*,	:	
Defendants	:	

MEMORANDUM

On March 1, 2013, Plaintiff, David Floyd, an inmate formerly confined at the Allenwood Federal Correctional Center, ("FCC-Allenwood"), in White Deer, Pennsylvania, initiated the above-captioned action by filing a *Bivens*-styled civil rights complaint under the provisions of 28 U.S.C. § 1331. (Doc. 1). The matter is proceeding *via* an amended complaint. (Doc. 30). The named Defendants are Lieutenant J. Olshefski, Officer J. Cramer, Officer C. Meyers, and Officer J. Phillips.

Presently before the Court is Plaintiff's "motion to produce material for discovery and appoint counsel." (Doc. 51). For the reasons set forth below, the motion for discovery will be granted in part and denied in part, and the request for counsel will be denied without prejudice.

I. Request for Discovery

A. Standard of Review

A party who has received evasive or incomplete discovery responses may seek a court order compelling disclosure or discovery of the materials sought. *See* FED. R. CIV. P.

37(a). The moving party must demonstrate the relevance of the information sought to a particular claim or defense. The burden then shifts to the opposing party, who must demonstrate in specific terms why a discovery request does not fall within the broad scope of discovery or is otherwise privileged or improper. *Goodman v. Wagner*, 553 F. Supp. 255, 258 (E.D. Pa. 1982).

Generally, courts afford considerable latitude in discovery in order to ensure that litigation proceeds with "the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, 349 U.S. 495, 501 (1947). The procedural rule defining the scope and limits of discovery provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." FED. R. CIV. P. 26(b)(1). "[A]ll relevant material is discoverable unless an applicable evidentiary privilege is asserted. The presumption that such matter is discoverable, however, is defeasible." *Pearson v. Miller*, 211 F.2d 57, 65 (3d Cir. 2000). Furthermore, the court may limit discovery where: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from

some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." FED. R. CIV. P. 26(b)(2)(c).

B. Discussion

In the instant motion to compel discovery, Plaintiff sets forth ten (10) requests for production of documents that he asserts are relevant and necessary for the litigation of his case. (Doc. 51). Plaintiff's discovery requests will be granted insofar as they are relevant to the excessive force claim at issue in this matter. The Court finds that the following discovery requests, numbers 1, 2, 5, and 6, are relevant to the remaining claims before the Court, and will be granted.

Request Number 1

> Video from the camera located outside of the Lieutenant[']s office from the LSCI Allenwood compound between the hours of 0930 and 0950. By producing this video it will show that Mr. Floyd's claims from the August 24, 2011 incident were prevaricated by the defendants and that Mr. Floyd did not ever "jump" or "push off" any wall to assault Lt. Olshefski, or any other officer of the FBOP.

Request Number 2[1]

> Photographs taken per the request of SIA Officer D. Schontz, showing the bruises sustained after Officer J. Phillips assaulted Floyd while he was housed in the SHU.

---

[1] Although this request could reasonably be read to refer to an incident other than the August 24, 2011 incident, the Court will grant this request subject to such clarification as Defendants may offer in response.

> These photographs were taken on around the second week of January, 2012; after Floyd spoke with and filed a complaint with Schontz as well as the SHU Lt. S. Danner. SIA Officer Schontz should have noted in the record when these were taken.
>
> Request Number 5
>
> All employment records, and reviews of the defendants, showing any prior misconduct sanctions, and or administrative proceedings and discipline during their tenure with the federal bureau of prisons.
>
> Request Number 6
>
> The name or names and, if known, the address and telephone number of each individual likely to have discoverable information - along with the subjects of that information - that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

(Doc. 51, pp. 2-3).

To assist in the orderly and expeditious disposition of this action, Defendants shall provide the appropriate responses to Plaintiff's discovery requests 1, 2, 5, and 6, within (30) days of the date of this Order. The remainder of Plaintiff's requests, numbers 3, 4, 7, 8, 9, and 9, will be denied.

II. Request for the Appointment of Counsel

Although prisoners have no constitutional or statutory right to appointment of counsel in a civil case, the Court has discretion "to request an attorney to represent any person unable to afford counsel." 28 U.S.C. §1915(e)(1); *Parham v. Johnson*, 126 F.3d 454, 456-57 (3d Cir. 1997); *Montgomery v. Pinchak*, 294 F.3d 492, 499 (3d Cir. 2002); *Tabron v.*

Grace, 6 F.3d 147, 153 (3d Cir. 1993). The United States Court of Appeals for the Third Circuit has stated that the appointment of counsel for an indigent litigant should be made when circumstances indicate "the likelihood of substantial prejudice to him resulting, for example, from his probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984).

The initial determination to be made by the Court in evaluating the expenditure of the "precious commodity" of volunteer counsel is whether the case has some arguable merit in fact or law. *Montgomery*, 294 F.3d at 499. If a plaintiff overcomes this threshold hurdle, other factors to be examined are:

(1) the plaintiff's ability to present his or her own case;
(2) the difficulty of the particular legal issues;
(3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue investigation;
(4) the plaintiff's capacity to retain counsel on his or her own behalf;
(5) the extent to which the case is likely to turn on credibility determinations; and
(6) whether the case will require testimony from expert witnesses.

Id. (citing *Tabron*, 6 F.3d at 155-57). The Third Circuit Court of Appeals added two other factors to be taken into consideration: (1) the court's willingness to aid the indigent party in presenting his or her own case; and (2) the available supply of lawyers willing to accept section 1915(e) requests within the relevant geographic area. *See Gordon v. Gonzalez*, 232 Fed. Appx. 153 (3d Cir. 2007).

Assuming *arguendo* that the complaint has merit, Plaintiff fails to set forth any circumstances warranting the appointment of counsel. *See Tabron*, 6 F.3d at 155-56. It appears that Plaintiff is capable of properly and forcefully prosecuting his claims, and that discovery neither implicates complex legal or factual issues. The legal issues herein are relatively simple and may not require expert testimony. Furthermore, despite his incarceration, investigation of the facts is not beyond Plaintiff's capabilities and he is familiar with the facts of his case. Thus far, it is obvious that Plaintiff is capable of competently litigating this matter. It is also noted that this Court does not have a large group of attorneys who would represent this action in a *pro bono* capacity.

Based on the foregoing, it does not appear that Plaintiff will suffer prejudice if forced to prosecute this case on his own. The Court's duty to construe *pro se* pleadings liberally, *Haines v. Kerner*, 404 U.S. 519 (1972), *Riley v. Jeffes*, 777 F.2d 143, 147-48 (3d Cir. 1985), coupled with Plaintiff's apparent ability to litigate this action, militate against the appointment of counsel. Accordingly, the request for appointment of counsel will be denied, however said denial will be without prejudice. As the Court in *Tabron* stated,

> [A]ppointment of counsel under § 1915(d) may be made at any point in the litigation and may be made by the district court *sua sponte* ... even if it does not appear until trial (or immediately before trial) that an indigent litigant is not capable of trying his or her case, the district court should consider appointment of counsel at that point.

Tabron, 6 F.3d at 156-57. Therefore, in the event that future proceedings demonstrate the

need for counsel, the matter may be reconsidered either *sua sponte* or upon motion of Plaintiff.

An appropriate Order shall issue.

Date: February 22, 2016

Robert D. Mariani
United States District Judge